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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,) 3:09-cr-00087-HDM-VPC
11 Plaintiff,)
12 vs.) ORDER
13 SEAN FOLLETT,)
14 Defendant.)
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16 Defendant has filed a "motion for sentence modification"
17 asking that his sentence in this case be modified to run
18 concurrently to a state court sentence he is serving (#36). The
19 government has responded (#37). Defendant has not replied, and the
20 time for doing so has expired.

21 On April 28, 2010, the defendant pled guilty to knowing
22 possession of a stolen firearm in violation of 18 U.S.C. § 922(j)
23 pursuant to a binding plea agreement, which called for a sentence
24 of 120 months. On August 4, 2010, the defendant was sentenced to
25 120 months pursuant to the binding plea agreement. As a
26 consequence of the parties' agreement, the defendant avoided a
27 possible sentence under the career offender statute and guidelines
28 provisions.

1 Generally, the court lacks authority to modify a term of
2 imprisonment once it has been imposed, but exceptions exist. See
3 18 U.S.C. § 3582(c). The only exception arguably applicable to
4 defendant's case at this time is § 3582(c)(1)(B), which allows the
5 court to modify a sentence "to the extent otherwise expressly
6 permitted by statute or by Rule 35 of the Federal Rules of Criminal
7 Procedure."

8 Rule 35(a) allows the court to correct a sentence within seven
9 days after sentencing for arithmetical, technical, or other clear
10 error. As more than seven days have passed since defendant was
11 sentenced, the court lacks the authority to modify defendant's
12 sentence under Rule 35(a). Accordingly, to the extent defendant's
13 motion is based on Rule 35(a), the motion is denied.¹

14 The court may also correct a sentence under 28 U.S.C. § 2255.
15 In arguing ineffective assistance of counsel, the defendant appears
16 to be asserting a § 2255 claim. However, motions pursuant to §
17 2255 must be filed within one year from the latest of

18 (1) the date on which the judgment of conviction
19 becomes final;

20 (2) the date on which the impediment to making a
21 motion created by governmental action in violation of
22 the Constitution or laws of the United States is
23 removed, if the movant was prevented from making a
24 motion by such governmental action;

25 (3) the date on which the right asserted was
26 initially recognized by the Supreme Court, if that
27 right has been newly recognized by the Supreme Court
28 and made retroactively applicable to cases on
collateral review; or

(4) the date on which the facts supporting the claim

¹ Rule 35(b), which allows for reduction of sentence for substantial cooperation upon motion of the government, clearly does not apply to defendant's motion.

1 or claims presented could have been discovered
2 through the exercise of due diligence.

3 *Id.* § 2255(f). The judgment of conviction was entered in this case
4 on August 5, 2010. As defendant did not appeal his sentence, it
5 became final on August 19, 2010. See Fed. R. App. P. 4(b).
6 Defendant filed his motion for sentence modification on August 1,
7 2012, nearly two years later. To the extent defendant is filing a
8 motion under § 2255, then, the motion appears to be untimely.
9 Defendant is therefore ordered to advise the court on or before
10 October 17, 2012, whether he is seeking relief pursuant to § 2255,
11 and if so, why any claim brought under § 2255 should not be
12 dismissed as untimely.

13 Accordingly, the court hereby denies in part and reserves in
14 part on defendant's motion for sentence modification based on
15 ineffective assistance of counsel (#36). The motion is denied
16 insofar as it is based on Federal Rule of Criminal Procedure 35(a).
17 The court reserves on that portion of the defendant's motion that
18 can be construed as a § 2255 motion to allow defendant an
19 opportunity to supplement the motion setting forth with
20 particularity why the motion under 28 U.S.C. § 2255 should not be
21 dismissed as untimely. The supplement shall be filed no later than
22 October 17, 2012. Failure to file a supplement shall result in a
23 denial of the motion.

24 **IT IS SO ORDERED.**

25 DATED: This 17th day of September, 2012.

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27 UNITED STATES DISTRICT JUDGE
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